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NO. 80753-1

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SUPREME COURT
OF THE STATE OF WASHINGTON

AMERICAN BEST FOOD, INC. a Washington corporation d/b/a CAFÉ
ARIZONA; and MYUNG CHOL SEO and HYUN HEUI SE-JEONG,

Respondents,

v.

ALEA LONDON, LTD., a foreign corporation,

Petitioner.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE
PROFESSOR KAREN WEAVER AND INTERESTED LONDON
MARKET INSURERS

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I. INTRODUCTION

Respondents American Best Food, Inc. d/b/a Café Arizona and its operators Myung Chol Seo and Hun Heui Se-Jeong (collectively “Café Arizona”) join in part and oppose in part the Brief of Amicus Curiae Professor Karen Weaver and Interested London Insurers (“London Brief”). To the extent the London Brief seeks a clear standard from this Court for what constitutes a bad faith breach of the duty to defend, and to the extent the London Brief seeks determination of Café Arizona’s bad faith claim as a matter of law, Café Arizona agrees with and joins in the London Brief. To the extent the London Brief asserts this Court in this case can and should determine as a matter of law whether Alea wrongfully denied it a defense, Café Arizona agrees with and joins with the London Brief. Café Arizona disagrees with the London Brief’s conclusion on the bad faith issue, however, and Café Arizona contends Alea, as a matter of law, denied Café Arizona a defense unreasonably and in bad faith.

Regarding the policy arguments in favor of the insurance industry and case-specific arguments against Café Arizona’s interest advanced in the London Brief, Café Arizona submits the following response.

II. FACTS

The facts of this case have been adequately briefed by the parties. For brevity, Café Arizona will not repeat relevant facts in this Answer and

instead incorporates the facts sections from its prior briefing by this reference.

III. RESPONSE

A. This Case Presented a Matter of First Impression.

The London Brief misapprehends the Court of Appeals' decision in contending that it wrongfully relied on out of state cases to arrive at its holdings in *American Best Food, Inc. v. Alea London, Ltd.*, 138 Wn. App. 674, 688, 158 P.3d 119 (2007) *Food*. To the contrary, the Court of Appeals correctly acknowledged that post-assault conduct raised an issue of first impression in Washington and looked to out of state authority for guidance on applying an A/B Exclusion to claims of post-assault negligence. There was nothing improper about the Court of Appeals' review of such persuasive authority under the circumstances. Café Arizona addresses this issue at length in its Answer to Brief of Amicus Curiae State Farm, and incorporates such arguments here by this reference.

B. The Policy Arguments Advanced in the London Brief do not Justify Alea's Bad Faith Breach of its Duty to Defend.

The policy arguments advanced in the London Brief explain how the insurance industry operates and support this Court rendering a final decision in this case containing a clear standard to measure an insurer's

conduct. It is beyond dispute that the insurance industry should not be forced to pay uninsured claims and that Washington courts are well advised to provide clear standards to allow insurers to analyze claims and make consistent and reasoned determinations regarding when to accept and when to deny defense to their insureds. However, these considerations do not excuse Alea's conduct in this case or militate against Café Arizona's claims of bad faith.

1. Alea Breached its Duty to Defend Café Arizona.

When Café Arizona was sued in the underlying lawsuit, the complaint contained an allegation of negligence against Café Arizona related to its alleged conduct *after* an assault occurred. At the time, the only case in Washington analyzing an insurance policy assault and battery exclusion ("A/B Exclusion"), *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000), dealt only with claims of pre-assault negligence. Café Arizona's counsel clarified this distinction to Alea, argued that *McAllister* is not controlling law, and provided Alea with case law from other jurisdictions holding that A/B Exclusions do not apply to claims of post-assault negligence in the same way as they apply to claims of pre-assault negligence. Despite the fact the application of an A/B Exclusion to claims of post-assault negligence was a matter of first impression in Washington, and despite Café Arizona providing Alea with

the correct legal analysis, Alea denied Café Arizona's tender of defense and abandoned its insured in the face of an expensive and difficult lawsuit.

Alea justifies its actions with a convoluted analysis of a variety of cases, most of which deal with the interpretation of the phrase "arising out of" in a variety of inapplicable contexts. Alea cobbles these cases together with the holding of *McAllister*, that an A/B Exclusion precluded coverage for claims of pre-assault negligence, and concludes it was justified in its prediction a Washington court would rule in its favor on this matter of first impression. Alea's arguments both at the time of denial of the defense and its briefing before the Court of Appeals and this Court ignore the existing legal test – namely that an insurer must defend unless claims are "clearly not covered." *E.g. Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002).

Subsequently, the Court of Appeals unanimously agreed Alea breached its duty to defend because the A/B Exclusion did not clearly preclude coverage. *American Best Food.* Significantly, Judge Coleman authored the *McAllister* decision and joined in the *American Best Food* decision, which stated that *McAllister* does not apply to claims of post-assault negligence. 138 Wn. App. at 686.

2. Because the A/B Exclusion did not Clearly Apply, Alea Had a Duty to Defend Under a Reservation of Rights and File a Declaratory Action.

The London Brief seems to suggest Alea's only options were to indemnify Café Arizona or deny its tender of defense. This misstates the obvious option available to an insurer facing a questionable claim where the duty to defend is not clearly absent: to defend under a reservation of rights and file a declaratory action. As Café Arizona explains at length in its Answer to Brief of Amicus Curiae Washington State Trial Lawyers Foundation ("Answer to WSTLA"), this Court has given clear guidance over the past ten years to insurers in Alea's situation on how to meet their duty to defend under a reservation of rights unless the claims are clearly not covered. *E.g.*, *Kirk v. Mt. Airy Ins. Co.* 134 Wn.2d 558, fn 3, 951 P.2d 1124 (1998); *Vanport*, 147 Wn.2d at 761; *Woo v. Firemen's Fund Ins. Co.*, 161 Wn.2d 43, 53-54, 164 P.3d 454 (2007).

3. The London Brief's Policy Arguments Omit a Reference to the Policy Behind the Broad Duty to Defend.

The London Brief describes a parade of horrors that would allegedly befall the Washington insurance consumer if the *American Best Food* decision is affirmed by this Court. Specifically, the London Brief suggests that holding Alea accountable for its bad faith refusal to defend would lead to insurers paying uninsured claims, increasing premiums,

reducing volumes, and ultimately fleeing the state entirely. London Brief at 10. What this doomsday scenario fails to include is the ease with which an insurer can avoid any of these consequences. Washington courts have long since established a fast and easy safe harbor for an insurance company facing a potentially covered claim, and that is to defend under a reservation of rights and file a declaratory action to determine the coverage issues.

This case is a perfect example of why Washington places such a strong emphasis on an insurer's duty to defend. Here, despite Café Arizona's counsel explaining to Alea precisely the coverage analysis ultimately relied upon by the Court of Appeals to determine Alea breached its duty to defend, Alea elected to gamble on how the court would rule on a matter of first impression and denied Café Arizona a defense. Because of Alea's denial, Café Arizona has been forced to bear all of its defense costs in the underlying lawsuit in addition to the costs of prosecuting this declaratory judgment action. Alea deprived Café Arizona of one of the most important benefits of its insurance policy, and did so based on a flawed and untested legal theory. This conduct finds justification neither at law nor through the broad policy arguments advanced by the London Brief.

C. This Court Should Find Alea Breached its Duty to Defend in Bad Faith as a Matter of Law.

The London Brief correctly recites the rule that matters of law are to be determined by the court and not by the ultimate finder of fact. London Brief at 11-12. In fact, all parties and Amici agree on this point and urge the Court to rule on Café Arizona's bad faith claim as a matter of law. This Court has sustained summary judgment in favor of an insured's bad faith claims on multiple occasions. *E.g., Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 1612 Wn.2d 903, 169 P.3d 1 (2007). To the extent the London Brief argues Café Arizona's claims should be determined as a matter of law, Café Arizona joins in the London Brief.

It is notable that the London Brief merely asserts Alea's breach of its duty to defend should not be deemed to be bad faith. The London Brief omits any detailed analysis of how the Court should arrive at that conclusion. By comparison, Café Arizona provides a detailed analysis here and in its underlying briefs of why the Court should rule in its favor on its bad faith claim as a matter of law.

D. The Appropriate Standard is Whether it was Reasonably Debatable that Claims were Clearly Not Covered.

The London Brief refers to the rule in Washington that an insurer does not commit bad faith by breaching its duty to defend unless its coverage determination was unreasonable, frivolous, or unfounded.

London Brief at 7. Like Alea, the London Brief fails to extend this analysis to the crucial question at issue in this case: what standard should be applied when an insurer alleges bad faith breach of the duty to defend? As Café Arizona describes at length in its earlier briefing and its Answer to WSTLA, this reasonableness standard must be compatible with the rule that an insurer may not deny a defense unless a claim is “clearly not covered” *Vanport*, 147 Wn. at 760, or as this Court stated since the instant case was decided by the Court of Appeals: “if there are *any* facts in the pleadings that could conceivably give rise to a duty to defend . . .” *Woo*, 161 Wn.2d at 53. Thus, as effectively argued in the Brief of Amicus Washington State Trial Lawyers Association Foundation, the appropriate standard to be applied here is whether it was reasonably debatable that a claim was clearly not covered. Under this test there was no basis for reasonable debate as to whether a duty to defend (as contrasted to the ultimate duty to indemnify) existed, and therefore Alea’s denial of a defense was unreasonable and constituted bad faith as a matter of law.¹

¹ This is the correct result applying the reasoning of *Vanport* and *Woo*. If the Court applies the presumption of unreasonableness suggested by Café Arizona, this outcome can be enunciated with a test which gives insurers what they are asking for: a bright line test which will prevent the apparent confusion by the carriers in both this case and *Woo*. See Answer to Brief of Amicus Washington State Trial Lawyers Association Foundation at 5-13.

The London Brief also relies on the rule that Café Arizona bears the burden of proving Alea's refusal to defend and its supporting legal analysis are unreasonable. London Brief at 7. Café Arizona also argues in its Answer to WSTLA that this burden should be shifted to the insurer in cases where the duty to defend has been breached by means of a rebuttable presumption of unreasonableness. Café Arizona incorporates this argument here by this reference.

E. Alea's Breach of its Duty to Defend is Evidence of Bad Faith.

The London Brief incorrectly asserts on Page 8 it was error for the Court of Appeals to state "[t]he fact that Alea incorrectly determined that it had no duty to defend is evidence of bad faith." See *American Best Food*, 138 Wn. App. at 691. If the Court determines Alea's refusal to defend was not based on a reasonably debatable argument that the claims against Café Arizona were clearly not covered, then Alea breached its duty in bad faith as a matter of law. The circumstances under which an insurer denies a duty to defend certainly are evidence of bad faith.

The Court of Appeals' only error related to this determination was in declining to rule on Café Arizona's bad faith claim as a matter of law. There are no issues of fact related to Alea's analysis of the underlying lawsuit or its development of its erroneous legal theory. The Court has ample information before it regarding Alea's conduct and its decision to

deny Café Arizona a defense. This is not a case where the facts of the insurer's conduct need to be tried before a jury. Instead, Alea has openly admitted to both the Court of Appeals and this Court its actions in misconstruing non-controlling law and using that analysis to support its decision to deny its duty to defend. Alea used the same approach expressly rejected by this Court in *Woo*, that an insurer may rely upon its own interpretation as to the case law and its own prediction of the direction that case law may be moving. "However, the duty to defend requires an insurer to give the insured the benefit of the doubt . . ." rather than "relying on an equivocal interpretation of the case law to give itself the benefit of the doubt rather than the insured." *Woo*, 161 Wn.2d at 463.

IV. CONCLUSION


The London Brief is correct in its conclusion that the Court should rule on Café Arizona's bad faith claims as a matter of law. In this regard, Café Arizona agrees with and joins in the London Brief. Contrary to the conclusion asserted, unsupported by any reasoned analysis, Café Arizona urges the Court to apply its test enunciated in *Vanport* and recently reaffirmed by *Woo*, that a defense must be extended except where there is no reasonable debate that the claim is clearly not covered. Alea's refusal to acknowledge (even now) and apply that test was unreasonable and constitutes bad faith. The remaining arguments in the London Brief are

unpersuasive and should be disregarded by the Court for the reasons explained above.

RESPECTFULLY SUBMITTED this 13th day of October, 2008

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

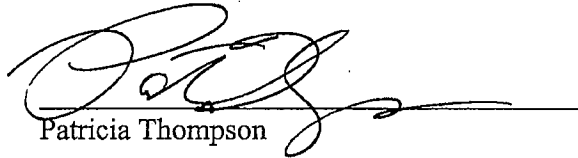
That on October 13, 2008, I caused to be delivered by email pursuant to prior authorization a true and correct copy of Respondents American Best Food, Inc. d/b/a Café Arizona, Myung Chol Seo, and Hyun Heui Se-Jeong's Answer to Brief of Amicus Curiae Karen Weaver to:

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RESPONDENTS' ANSWER TO BRIEF OF
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I. INTRODUCTION

Respondents American Best Food, Inc. d/b/a Café Arizona and its operators Myung Chol Seo and Hun Heui Se-Jeong (collectively “Café Arizona”) agree with the Brief of Amicus Curiae State Farm Fire & Casualty Company (“State Farm Brief”) to the extent it asserts the efficient proximate cause doctrine has no application in this case. Café Arizona disagrees with the remaining portions of the State Farm Brief, as the following response explains.

II. FACTS

The facts of this case have been adequately briefed by the parties. For brevity, Café Arizona will not repeat relevant facts in this Answer and instead incorporates the facts sections from its prior briefing by this reference.

III. RESPONSE

A. The Court of Appeals Correctly Considered Out-of-State Authority.

State Farm repeatedly argues the Court of Appeals incorrectly “relied on” and “base[d] its decision on” out-of-state authority. State Farm Brief at 11, 17. This fundamentally misapprehends and/or misstates the *American Best Food* decision. *American Best Food, Inc. v. Alea London, Ltd.*, 138 Wn. App. 674, 688, 158 P.3d 119 (2007). To the

contrary, the Court of Appeals first considered Washington law and ruled, as Café Arizona's counsel had pointed out to Alea at the time of the tender of defense, that construction of the "arising out of an assault" exclusion ("A/B Exclusion"), as applied to post-assault conduct, was an issue of first impression in Washington. Thus, the Court of Appeals appropriately considered cases from other jurisdictions and ultimately included references to these cases in the *American Best Food* opinion because the analyses were so similar and because the cases presented nearly identical facts. State Farm attempts to frame the issue as if the Court of Appeals relied on the out-of-state authorities to interpret the language of the A/B Exclusion at issue in this case. This is simply incorrect.

Prior to the *American Best Food* decision, the only Washington case to interpret and apply an A/B Exclusion was *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106, 11 P.3d 859 (2000). In *McAllister*, an individual was assaulted and injured at a nightclub and sued the club owner alleging negligence because the security guards knew of the melee but took no action. The injured party made no allegation of negligence for any action or harm aside from the assault. *Id.* at 108. Because the alleged negligence of the club owner could only be established by first proving the assault occurred, the court determined the A/B Exclusion precluded coverage. *Id.* at 111.

In stark contrast to *McAllister*, here a club patron alleged he was shot outside the club, walked back inside the club, and was subsequently forcibly removed by security guards who dumped him on the sidewalk. The plaintiff alleged separate and distinct claims of negligence against Café Arizona for its conduct in allegedly having him removed and dumped on the sidewalk after the assault. The plaintiff also alleged this treatment caused him separate injury. Thus, the underlying case here presents a distinct claim of post-assault negligence.

Because there was no Washington authority on point, the Court of Appeals decided the issue as a matter of first impression, which it unquestionably was, and merely cited to factually similar out-of-state decisions where the same conclusion had been reached. State Farm urges it was error to “rely” on these cases, yet a careful reading of *American Best Food* leads to the conclusion the Court of Appeals arrived at its own reasoned determination of this previously undecided issue and did not “rely” on the cases it cited to as persuasive authority.

The court’s analysis in *American Best Food* is quite easy to follow. The court first cites to *McAllister*, although it quickly determines *McAllister* does not apply. 138 Wn. App. at 686. The court then lists several out-of-state decisions based on similar allegations of post-assault negligence, all of which determine such claims are not precluded by an

A/B Exclusion because they allege distinct and separate claims of negligence and harm occurring after the assault. *Id.* at 687. After considering these cases, and the lack of applicable authority reaching a contrary result, the court states its key analysis:

Dorsey alleged that employees of Café Arizona exacerbated his gunshot injuries. Dorsey's original complaint alleged that, after he had been shot, employees of Café Arizona "dumped him back on the sidewalk," and his amended complaint clarified that allegation. The alleged act of ordering employees to carry a gravely wounded Dorsey outside, and the alleged act of 'dumping' him on the sidewalk constitute 'discrete intervening acts of alleged negligence' that Dorsey claims caused injury. The harm these alleged acts occasioned is distinct from the prior harm caused by the assault or battery. Carrying and "dumping" a severely wounded patron posed a substantial risk of grave injury, regardless of the initial cause of the patron's physical distress. Unlike the situation in McAllister, negligence can here be proved 'without first establishing the underlying assault.' Thus, Dorsey's alleged subsequent injury at the hands of Café Arizona employees does not clearly "arise out of" the prior assault or battery.

Id. (Emphasis added, internal citations omitted).

Thus, the Court of Appeals determined, as a matter of first impression and based upon a well-reasoned analysis, that the A/B Exclusion does not preclude coverage because the complaint alleges separate and distinct claims of negligence against Café Arizona for its conduct after the assault, and from which the plaintiff alleges separate and distinct harm. It is also crucial to point out the Court of Appeals used the correct standard by determining the exclusion did not "clearly" apply to

preclude coverage. *E.g. Woo v. Firemen's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (an insurer must defend "unless the claim alleged in the complaint is clearly not covered by the policy."); *accord Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002).

State Farm's criticism of the *American Best Foods* decision for "relying" on out-of-state authority lacks merit.

B. *American Best Food* is not Inconsistent with Washington Courts' Definition of "Arising out of."

State Farm argues at length that the Court of Appeals utilized the wrong definition of "arising out of" in the *American Best Food* decision. This argument is a red herring. In fact, the *American Best Food* decision does not parse the definition of "arising out of" because no reasonable definition of that term could lead to a differing result here. This argument is merely an effort on State Farm's and Alea's part to refocus the Court's attention from the material elements of the *American Best Food* decision to a quagmire of inapplicable case law.

The Court of Appeals applied the appropriate rationale in *American Best Food* – a rationale based on the nature of the claims alleged in the assault and following events distinct from the assault. The key points in the decision are the allegation of separate acts of negligence,

allegation of separate harm, and the timing of such alleged acts and negligence occurring after and unrelated to the underlying assault.

1. The Washington "Arising out of" Cases Cited by State Farm are Inapposite.

State Farm cites to a multitude of inapplicable Washington cases that include the phrase "arising out of" in one context or another. State Farm attempts to convolute the issue by focusing not on the operative facts of the case and the nature of the specific claims, as this Court must, but instead by throwing up a hastily constructed façade of cases linked only by the existence of the phrase "arising out of" in the insurance policy at issue. Many of these cases deal with first party policies, and many analyze the phrase "arising out of" in the grant of coverage instead of an exclusion. These cases are not controlling regarding the key issue before the court in *American Best Food* because none of these cases deal with a claim of post-assault negligence or the application of an A/B Exclusion from a commercial general liability policy.

As an example, State Farm cites positively to *Beckman v. Connolly*, 79 Wn. App. 265, 898 P.2d 357 (1995). In *Beckman*, an individual ignited a gas can in the cab of a truck while driving, causing an accident and burning his passenger. *Id.* at 267. Thus, the negligence claims all related to a single accident caused by a single negligent act and

resulting in a single harm. No facts were alleged in *Beckman* that would establish any manner of separate or distinct claim occurring after the accident.

Another case relied on by State Farm, *McDonald Industries, Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 631 P.2d 947 (1981), suffers from the same inapplicability. *McDonald* also deals with a single event and a single harm – the case (another auto accident) involves an insured who was driving a tractor, lost his load, and caused a two-car accident. *Id.* at 910. The phrase “arising out of” appeared in the broad grant of coverage section of the policy. *McDonald* deals with a single occurrence with no allegation of separate negligence aside from the use of the tractor, and there can be no doubt the accident “arose from” the use of the tractor. Because there is no allegation of a separate act of negligence causing a second harm, and because the language is not interpreted in an exclusion from coverage, this case is not helpful in analyzing the post-assault negligence claims alleged here.

Also notable is State Farm’s reliance on *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 91 P.3d 879 (2004) because *Bowen* strongly supports

the conclusion that Alea breached its duty to defend here in bad faith.¹ In *Bowen*, a purchaser of a home sued the seller and the seller's son for intentional and/or negligent misrepresentations about the existence of problems with the sewer system. The seller and her son both tendered defense of the claim to Allstate on their respective homeowners policies. *Id.* at 881. Allstate offered a defense under a reservation of rights and then filed a declaratory action to have the court determine whether it owed its insureds a duty to defend or indemnify. *Id.* at 882. Recognizing the breadth of the duty to defend, Allstate explained its limited defense to its insured, stating "because Washington Courts have not specifically ruled on homeowner policy coverage related to the allegation of negligent misrepresentation, there may be coverage and defense for the Plaintiff's Misrepresentation Cause of Action in this lawsuit under your Allstate policy." *Id.* at 885. The court ultimately ruled that although there was no duty to indemnify, Allstate did have a duty to defend its insureds. *Id.* at 886.

¹ *Bowen* is also inapposite because the case dealt with claims of misrepresentation related to an existing condition and the application of the broad grant of coverage in a homeowners policy. These facts are clearly distinguishable from the post-assault negligence claims alleged here and the application of the A/B Exclusion to such claims.

Thus, unlike Alea's bad faith breach of its duty to defend here, in *Bowen Allstate* took the appropriate step of defending under a reservation of rights. Although *Bowen* is not factually on point, it is a clear example of the breadth of the duty to defend and also demonstrates how easily an insurer may follow the direction of this Court and simply defend under a reservation of rights and file a declaratory action where there is an absence of controlling Washington law clarifying whether coverage exists.

None of the Washington cases cited by State Farm control here because none of them deal with distinct claims of post-assault negligence. Moreover, none of these cases deal with the temporal scope of an exclusion to a CGL policy. The Court of Appeals had no guidance from any Washington decision on how to apply an A/B Exclusion to claims of post-assault negligence, so the court correctly considered factually similar cases from other jurisdictions.

2. The Out-of-State "Arising out of" Cases Cited by State Farm are not Controlling Law and are Inapposite.

State Farm also cites to several out-of-state cases in support of a broad definition of "arising out of," which is curious given State Farm's criticism of the Court of Appeals for merely quoting out-of-state case law. Regardless, State Farm's two out-of-state cases suffer from the same

infirmity as the Washington cases – neither deals squarely with claims of separate and distinct acts of negligence occurring after an assault.

In *Canutillo Independent School District v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, a Texas case, the question was whether an exclusion precluded coverage for a claim against a school district that it failed to prevent sexual abuse committed by an elementary school teacher and a claim of emotional distress from the conduct of other teachers related to the sexual assault. 99 F.3d 695, 702 (5th Cir. 1996). The court determined the exclusion applied because the claims were “related to and dependent upon” the excluded sexual assault. *Id.* at 705. Because the plaintiffs did not allege separate and distinct claims and separate and distinct harm, *Canutillo* is not applicable to this case even as persuasive out-of-state authority.

In *Continental Casualty Co. v. City of Richmond*, a California case, plaintiffs sued the City of Richmond for wrongful death and civil rights claims stemming from the death of an inmate during an altercation with prison guards. 763 F.2d 1076, 1078 (9th Cir. 1985). The court applied the claims to an exclusionary provision with notably different language than the A/B Exclusion here. In *City of Richmond*, the exclusion precluded coverage for claims “arising directly or consequentially from . . . [injury or death].” The court noted the inclusion of the words “directly or

consequentially” required an especially broad interpretation of “arising out of” to include even a slight connection. *Id.* at 1081. The court ultimately determined the claims were all connected to the excluded injury and death of the decedent. *Id.* Thus, as in *Canutillo*, in *City of Richmond* there were no allegations of separate and distinct negligence or harm occurring after the excluded injury.

In contrast to the dissimilar cases cited by State Farm, the Court of Appeals cited to several out-of-state cases that were directly on point. In fact, the only reported cases cited in the years of briefing associated with this action that are factually on point are the cases noted by the Court of Appeals in *American Best Food*.

3. Applying the Definition of “Arising out of” Advanced by State Farm does not Preclude Coverage of Post-Assault Negligence Claims.

State Farm argues a broad definition of “arising out of” as defined in *Beckman* should have been specifically included in the *American Best Food* decision. This argument presupposes *American Best Food* uses an incorrect and narrow definition, but the opinion does not support that conclusion. To the contrary, the opinion utilized the appropriate definition and analysis without specifically defining the phrase “arising out of.”

Beckman defines “arising out of” as meaning “that the claimed injury must have originated from, had its origin in, grown out of, or

flowed from the [excluded event].” 79 Wn. App. at 273-74. This definition is in no way incompatible with *American Best Food*. The ultimate irrelevance of State Farm’s argument can be demonstrated by simply swapping “arising out of” for the definition above in the key holding from *American Best Food*:

The alleged act[s] . . . constitute ‘discrete intervening acts of alleged negligence’ that Dorsey claims caused injury. The harm these alleged acts occasioned is distinct from the prior harm caused by the assault or battery. . . . Thus, Dorsey’s alleged subsequent injury at the hands of Café Arizona employees does not clearly [originate from, have its origin in, grow out of, or flow from] the prior assault or battery.

138 Wn. App. 688.

The holding is unaltered by the specific use of the broadest definition of “arising out of” set forth by State Farm. Thus, the Court of Appeals applied the phrase correctly even though it did not specifically define it earlier in the opinion. Perhaps this example explains the utter lack of analysis in the State Farm Brief of how this broad definition would lead to a different result if it had been specifically stated by the Court of Appeals in *American Best Food*.

Instead, the State Farm Brief attempts to characterize the *American Best Food* decision as having applied a proximate causation test, based solely on the use of the word “intervening” in its key analysis. Again, this

misstates the holding in *American Best Food*. The test applied was whether separate and distinct acts of negligence had been alleged to have occurred after the assault, which does not equate to proximate causation. The court did not analyze whether an “intervening cause” acted to break a chain of events for the purposes of tort liability, as a proximate causation analysis would require, but instead simply asked if the complaint alleged separate acts of negligence and harm occurring after the assault. Because such separate acts of negligence and harm were alleged, they do not clearly fall within the ambit of the A/B Exclusion. This is the case whether the phrase “arising out of” stands alone or whether its definition is spelled out.

Moreover, granting the premise that “but for” the assault there would have been no post-assault negligence does not answer the coverage question. In addition to the fact that the none of the cases cited by Alea deal with distinct claims for conduct occurring after an excluded event, exclusions are to be strictly construed in favor of the insured (and finding coverage). Therefore, normal rules of strict construction must act to restrict Alea’s argument for an open-ended interpretation of “arising out of” in the A/B Exclusion. To hold otherwise would mean there would be no coverage for any claim against Café Arizona for any conduct related to Dorsey after the assault, because he would not have come back into the

club were it not for the assault. Under Alea's application of "arising out of" there would be no coverage if Café Arizona employees had run a red light while driving Dorsey to the hospital, or any other manner of imaginable negligent conduct. There must be a bright line where claims "arising out of" the assault cease, and *American Best Food* creates the appropriate line with a temporal distinction between claims arising out of the assault and distinct claims for conduct occurring after the assault with distinct harm.

C. Efficient Proximate Cause Doctrine does not Apply to Exclude Coverage.

Café Arizona agrees with State Farm that the efficient proximate cause doctrine has no place in the analysis here. Café Arizona also took this position in its briefing before the Court of Appeals. The Court should disregard Alea's citation to efficient proximate cause authority.

D. Alea's Bad Faith Does not Hinge on Out-of-State Case Law.

State Farm argues Alea should not be determined to have breached its duty to defend in bad faith because it would be unfair to hinge such a ruling on Alea's misinterpretation of out-of-state case law. Again, this argument simply misapprehends the *American Best Food* holding.

The correct standard to apply to an allegation of a bad faith breach of the duty to defend is whether it was reasonably debatable that the claims were clearly not covered. Café Arizona addresses this standard at

length in its Answer to Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation, which is incorporated here by this reference.

The Court of Appeals first clarified Alea had a duty to defend Café Arizona because the underlying claims were not clearly excluded. *Id.* at 688. The court then correctly determined “[t]he fact that Alea incorrectly determined that it had no duty to defend is evidence of bad faith.” 138 Wn. App. at 691. Therefore, Alea’s bad faith ultimately turns on its decision to abandon its insured and deny a defense despite the claim raising an issue of first impression in Washington which had been squarely resolved on similar facts in other jurisdictions in favor of coverage. Alea did not need to inquire any further or read any cases in order to make the appropriate decision under Washington law; it had a duty from the moment it realized there was no binding Washington authority on point to make all inferences in favor of coverage for the insured and to defend under a reservation of rights and seek declaratory judgment. Instead, Alea interpreted the law in its own best interest and refused to defend a claim that was not clearly excluded. This violated the prohibition outlined by this Court in *Woo* against exactly this conduct by insurers. Alea acted in bad faith as a matter of law.

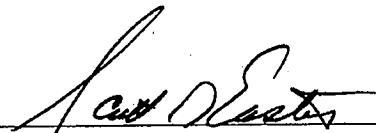
IV. CONCLUSION

Much of the State Farm Brief's analysis simply misconstrues the *American Best Food* decision or misdirects the Court's attention to immaterial matters. With the exception of its efficient proximate cause analysis, Café Arizona requests the Court disregard the State Farm Brief, as argued above.

RESPECTFULLY SUBMITTED this 13th day of October, 2008

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CERTIFICATE OF SERVICE

2008 OCT 22 P
BY RONALD R. CARPENTER

The undersigned declares under penalty of perjury, under the laws
of the State of Washington, that the following is true and correct: CLERK

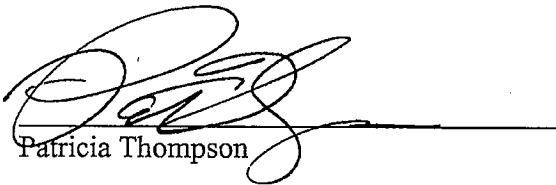
That on October 13, 2008, I caused to be delivered by email
pursuant to prior authority a true and correct copy of Respondents
American Best Food, Inc. d/b/a Café Arizona, Myung Chol Seo, and Hyun
Heui Se-Jeong's Answer to Brief of Amicus Curiae State Farm to:

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